

Exhibit 35

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3 Civil Action No. C.A. No. 04-1494 (JJF)

4 MAGTEN ASSET MANAGEMENT CORPORATION and
5 LAW DEBENTURE TRUST COMPANY OF NEW YORK,

6 Plaintiffs,

7 v.

8 NORTHWESTERN CORPORATION,

9 Defendant.

10 Civil Action No. C.A. No. 05-499 (JJF)

11 MAGTEN ASSET MANAGEMENT CORP.,

12 Plaintiff,

13 v.

14 MICHAEL J. HANSON and ERNIE J. KINDT,

15 Defendants.

16 -----

17 DEPOSITION OF

18 ERNIE KINDT

19 -----

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23

24

25 TAKEN ON: 6/28/2007

BY: DANA ANDERSON

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1 A. I don't think that this resolution names me as
2 an executive officer.

3 Q. If you see in the paragraph that says "Be it
4 resolved..." I'm skipping some lines, but it
5 says "The following named persons are hereby
6 elected as the executive officers of NWE for
7 the positions indicated."

8 A. Okay. I don't believe that this changed
9 anything as far as my management
10 responsibilities.

11 Q. Did your management responsibilities as vice
12 president of accounting ever change from the
13 time that NorthWestern acquired Montana Power
14 until the time you left the company?

15 A. I had changes of duties as certain people
16 elected to take the change of control. But
17 other than that, no.

18 Q. Would that have been an increase in duties?

19 A. Yes.

20 Q. And what additional duties did you take on?

21 A. Ellen Senechal, who was the treasurer at
22 Montana Power LLC became -- came across with
23 the Montana Power officers. When she left, I
24 was made the contact, and I was responsible for
25 making sure that the requirements of filings

1 with the certain debt holders were completed on
2 time.

3 Q. When you say the certain debt holders, does
4 that include the QUIPS?

5 A. Yes, I believe it does.

6 Q. And when did you become responsible for contact
7 and filings relating to the QUIPS?

8 A. When Ellen left, and I think that that was in
9 August or September of 2002.

10 Q. And what specifically were your
11 responsibilities in connection with the QUIPS?

12 A. There were certain items that had to be filed
13 annually, I think an officer's certificate.
14 There was a book that had listed the items that
15 had to be filed. I don't remember them off the
16 top of my head.

17 Q. Did you sign the officer's certificates?

18 A. Yes, I believe I did.

19 Q. When you signed the officer's certificate, what
20 did you --

21 A. Wait a minute, maybe I -- I honestly don't
22 remember if I did or didn't.

23 Q. But you would have been -- whether you signed
24 them or not, you would have been the one that
25 put the package together and delivered the --

1 A. Yes.

2 Q. What, if anything, did you do to ensure that
3 the information in the book was accurate?

4 A. The information in the book?

5 Q. I thought you said that you would put together
6 a book that you would --

7 A. It wasn't that big. It was one or two pages.
8 And I think it listed the officers. It wasn't
9 anything that complicated.

10 Q. Did you do anything to ensure that the
11 officer's certificate was correct?

12 A. That it listed the correct officers.

13 Q. Is that the only thing that the officer's
14 certificate did?

15 A. I think so.

16 Q. Now, in November of 2002 the assets of
17 NorthWestern Energy LLC were transferred to
18 NorthWestern, correct?

19 MR. KALECZYC: Objection.

20 THE WITNESS: The assets and
21 liabilities of NorthWestern Energy LLC with
22 the exception of certain assets that were
23 not utility in nature were merged into
24 NorthWestern.

25 BY MR. KAPLAN:

1 Q. Let's take this a part a little bit. What was
2 your involvement in that transaction?

3 A. From an accounting standpoint there, wasn't a
4 whole lot of activity that was required on the
5 books. Basically we kept -- Montana operations
6 were already separate from everything else.
7 And so if you remember, I talked about the fact
8 that we were operated as an electric and gas
9 utility, but we kept everything for Nebraska
10 and South Dakota and Montana in separate
11 company codes on the accounting records.

12 And so since the Montana stuff was in
13 a separate company code and we're still going
14 to report them, for Montana purposes, on a
15 standalone basis, it was determined that the
16 easiest way to account for the going-flat
17 structure was to move the assets that were
18 staying in the Montana LLC. And I think it was
19 subsequently renamed to the Clark Fork LLC and
20 set up a separate company code for those
21 transactions.

22 Other than that, you still had equity
23 and earnings and that. So there was some title
24 changes on accounts, but it wasn't any massive
25 endeavor.

1 Q. How about with respect to the NorthWestern
2 Energy LLC debt, what was your -- what, if any,
3 responsibilities did you have in connection
4 with the going-flat transaction?

5 A. As far as --

6 MR. KALECZYC: Objection.

7 THE WITNESS: As far as the debt, I
8 think I may have transmitted some
9 paperwork, but that would be the full
10 extent of...

11 (Deposition Exhibit Number 2 marked
12 for identification.)

13 BY MR. KAPLAN:

14 Q. We'll mark as Kindt Exhibit 2 a document Bates
15 stamped NOR 000909 through NOR 000911.

16 A. (Reviews document.)

17 Q. Do you recognize this document?

18 A. Yes.

19 Q. Can you identify what it is?

20 A. This is a transmittal letter that transmitted
21 certain data that was -- certain documents that
22 were needed to complete the transaction.

23 Q. You see on the second page of the document
24 there is a list of four items?

25 A. Right.

1 Q. Six items, I'm sorry.

2 A. Uh-huh.

3 Q. Prior to submitting or transmitting this letter
4 did you review those six items?

5 A. I don't remember if I reviewed them or not.

6 Q. You don't recall whether you -- strike that.

7 Would you typically have reviewed
8 items such as this when sending them on to the
9 trustee?

10 A. These were documents that were drafted by
11 basically the lawyers that were responsible for
12 completing the transaction. They are legal
13 documents. My responsibility was more
14 administerial to assure that they were
15 transmitted.

16 Q. Presumably the lawyers could have transmitted
17 it by themselves?

18 A. I believe I was the contact with the bank.

19 Q. The officer's certificate wasn't a legal
20 document, was it?

21 MR. KALECZYC: Objection.

22 THE WITNESS: That I don't know.

23 BY MR. KAPLAN:

24 Q. Pardon?

25 A. I don't know if that's considered a legal

1 discussed it with, Mike Manning.

2 Q. Do you have any recollection of actually
3 discussing them?

4 A. No.

5 Q. Do you recall having any discussions with
6 anyone at NorthWestern, the parent corporation,
7 with respect to any of these six documents?

8 A. No, I don't.

9 Q. Do you remember ever taking any efforts to
10 ensure that any of these documents were true
11 and correct?

12 A. Like I indicated, these are documents that were
13 not financial in nature. And so there really
14 wasn't anything for me to review on these.

15 Q. In the course of your responsibilities, have
16 you ever reviewed indentures?

17 A. No.

18 Q. Even when you took over for Ms. Senechal you
19 didn't look at the indentures?

20 A. No.

21 Q. Do you recall ever having conversations with
22 anyone from The Bank of New York with respect
23 to any of these six documents?

24 A. No, I don't.

25 Q. Do you recall ever having any discussions with

1 The Bank of New York in connection with your
2 responsibilities for the QUIPS?

3 A. The only contact that I can remember having
4 with The Bank of New York would be related to
5 interest payments and to the annual filing. I
6 think there may have been a call to make sure
7 that everything was filed on time.

8 Q. Were you involved in the decision to transfer
9 the assets from NorthWestern Energy LLC to
10 NorthWestern?

11 A. No.

12 Q. Do you recall the first discussions that you
13 had with anyone at NorthWestern Energy LLC or
14 NorthWestern with respect to the transfer of
15 the assets?

16 A. I don't know if I can remember the specific
17 date that we discussed it. But Dave Monaghan
18 had kept people that reported to him aware that
19 they had requested an exemption from the Public
20 Utility Holding Company Act. When that
21 exemption was not received or was denied, we
22 were informed that the going-flat structure
23 would have to be undertaken. And so then there
24 was discussion as to what was the simplest way
25 accounting-wise to accomplish that.

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1 Q. In connection with the going-flat transaction,
2 did you review NorthWestern's -- when I say
3 NorthWestern, I mean the parent company's
4 financials?

5 A. As part of the going-flat structure, no, I did
6 not.

7 Q. Did you do any diligence to see whether
8 NorthWestern Corporation would be able to
9 satisfy obligations to the QUIPS holders?

10 A. NorthWestern owned the assets subject to the
11 liabilities that were outstanding. They were
12 assuming those liabilities. To the best of my
13 knowledge, they had the financial wherewithal
14 to continue to service the debt.

15 Q. What was that knowledge based on?

16 A. The cash flow was there. They were managing
17 the cash flow on a corporate basis at the time.
18 Whenever the utility needed cash, it was
19 available.

20 Q. Did you review projections to see whether the
21 cash flow would still be there?

22 A. No, I did not.

23 MS. DELANEY: Objection to form.

24 BY MR. KAPLAN:

25 Q. Did you -- did you review the financial

1 statements of the other NorthWestern divisions
2 or entities to see how they were performing?

3 A. No, I did not.

4 Q. Did you discuss with anyone at NorthWestern
5 whether they would have the financial
6 wherewithal to honor their obligations under
7 the QUIPS?

8 A. No, I did not.

9 Q. Did you review NorthWestern's public financial
10 statements, its SEC filings in connection with
11 the going-flat transaction?

12 A. Not specifically in conjunction with the
13 going-flat.

14 Q. Did you have any discussions with Mr. Hanson
15 with respect to whether NorthWestern would be
16 able to satisfy its obligations under the
17 QUIPS?

18 A. No, I did not.

19 Q. Did you have any concerns with respect to
20 whether NorthWestern would be able to satisfy
21 its obligations under the QUIPS?

22 A. No, I did not.

23 Q. Did you have any views as to the value of the
24 assets that were being transferred to
25 NorthWestern?

1 MR. KALECZYC: Objection.

2 MS. DELANEY: Objection, foundation.

3 THE WITNESS: Like I previously
4 indicated, my understanding was that
5 NorthWestern owned the LLC and effectively
6 owned the net assets and that all they were
7 doing was converting their ownership
8 interest into ownership of the actual
9 assets and that there was no actual sale.

10 BY MR. KAPLAN:

11 Q. You were an executive officer of NorthWestern
12 Energy LLC prior to November 15, 2002, correct?

13 A. Correct.

14 Q. You weren't an officer of
15 NorthWestern Corporation prior to that point,
16 were you?

17 A. That's correct.

18 Q. And as -- and you took direction from Mike
19 Hanson, correct?

20 MR. KALECZYC: Objection, vague.

21 BY MR. KAPLAN:

22 Q. You reported --

23 A. I took direction through Dave Monaghan who
24 reported to Mike Hanson.

25 Q. And Mike Hanson was the CEO of NorthWestern

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1 Q. Was -- following the going-flat transaction,
2 NorthWestern Energy LLC's name changed,
3 correct?

4 A. Yes.

5 Q. And it became known as Clark Fork and
6 Blackfoot?

7 A. Yes.

8 Q. Based on your understanding, following the
9 going-flat transaction, did Clark Fork have
10 sufficient cash flow to keep paying its
11 obligations?

12 A. The guarantee from NorthWestern provided the
13 cash flow for Clark Fork to pay its
14 obligations.

15 Q. Absent the guarantee, would it have had
16 sufficient cash flow to satisfy its
17 obligations?

18 A. Absent the guarantee, no.

19 Q. Did that concern you at the time that you
20 were -- at the time that the transfer was
21 occurring did that concern you?

22 A. The guarantee was there. And so there was no
23 need for concern.

24 Q. Did you do any analysis as to how much the
25 environmental liability could ultimately be?

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1 Q. If you knew that NorthWestern wouldn't be able
2 to satisfy its obligations, would you have
3 objected to the transfer?

4 MR. KALECZYC: Objection.

5 MS. DELANEY: Objection, calls for
6 speculation.

7 THE WITNESS: If I believed that
8 NorthWestern wouldn't be able to meet its
9 obligations, I honestly don't know what my
10 response would have been.

11 BY MR. KAPLAN:

12 Q. Did you ever discuss with anybody at
13 NorthWestern Energy LLC or
14 NorthWestern Corporation retaining a
15 third-party to evaluate the fairness of the
16 going-flat transaction?

17 A. As I previously stated, my belief was that
18 NorthWestern was the owner of the assets and
19 that all they were doing was changing the form
20 of that ownership from ownership of the LLC to
21 direct ownership of the net assets.

22 Q. But going specifically to my question, did you
23 ever discuss with anyone at NorthWestern Energy
24 LLC or NorthWestern Corporation having a third
25 party evaluate the fairness of the transaction?

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1 A. The Montana utility operations were typically
2 cash-flow negative starting in May and running
3 through November.

4 Q. I think there is a binder, it's the MFIR
5 binder, and I would like you to turn to the tab
6 that says May 2002.

7 A. (Complies.)

8 Q. And it's a document that's Bates stamped NOR
9 458099 through NOR 458119.

10 Are you familiar with this document?

11 MR. KALECZYC: Take your time to
12 review it before you answer.

13 THE WITNESS: (Reviews document.) No.
14 This is not a document that I am familiar
15 with.

16 BY MR. KAPLAN:

17 Q. Did you ever see these management financial and
18 information reports for any month?

19 A. No.

20 Q. If you turn to page 2 of 15.

21 MS. DELANEY: What page?

22 MR. KAPLAN: Says 2 of 15, which is
23 NOR 458102.

24 BY MR. KAPLAN:

25 Q. You see on the top there is a chart of an

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1 discussions.

2 Q. And what was the nature of the discussion?

3 A. There were discussions that -- and disclosures
4 in the annual report that indicated that there
5 was a liquidity challenge, that certain events
6 needed to go the company's way to resolve some
7 short-term cash-flow issues.

8 Q. When was the first time that you remember
9 hearing that there were liquidity or cash-flow
10 issues at NorthWestern?

11 A. Would have been in the spring, late winter,
12 early spring of 2003.

13 Q. Did you ever hear that in 2002?

14 A. Not that I recall.

15 Q. Based on your job responsibilities, to the
16 extent that NorthWestern was considering
17 sale-leaseback transactions for the utility
18 assets, would you have been involved?

19 MR. KALECZYC: Objection.

20 MS. DELANEY: What was the timeframe,
21 Gary?

22 MR. KAPLAN: At any time after
23 NorthWestern acquired Montana Power.

24 THE WITNESS: I do not recall any
25 discussions of sale-leaseback transactions

1 Q. I can clarify the question for you.

2 Solely with respect to funded debt, by
3 that, I mean bonds, QUIPS or bank loans, you
4 testified earlier that when Ms. Senechal left,
5 you took over her responsibility to administer
6 that, or if there is a better word, but to --

7 A. To provide the annual filings.

8 Q. To provide the annual filings for that debt.

9 Was there any NorthWestern Energy
10 funded debt for which you weren't responsible
11 for providing the filings?

12 A. Not that I can recall.

13 Q. Were you the regular -- were you the person at
14 NorthWestern Energy who would be -- who would
15 generally interface with the trustee or the
16 agent for the various issuances of debt?

17 A. I would not have been the person who negotiated
18 the issuance of new debt or the retirement of
19 old debt. That would have been someone else.

20 Q. But debt that was existing and just in the
21 ordinary course filing and submissions, would
22 you have been the person who would have been
23 most likely to interface with the agent or the
24 trustee?

25 MS. DELANEY: At what time?

1 MR. KAPLAN: After Ms. Senechal left
2 until -- while it was NorthWestern LLC.

3 THE WITNESS: I can be -- I can
4 honestly state that I had very little
5 contact with Ms. Lewicki. And I can't
6 recall more than one or two phone calls.

7 BY MR. KAPLAN:

8 Q. Are you aware of whether anybody else at
9 NorthWestern Energy was having the same or more
10 communication with Ms. Lewicki?

11 MR. KALECZYC: Objection.

12 THE WITNESS: I have no way of knowing
13 if anyone else had contact with
14 Ms. Lewicki.

15 BY MR. KAPLAN:

16 Q. Did Ms. Lewicki or anyone else from Bank of New
17 York ever ask you about the value of the
18 Milltown Dam or whether there were other
19 alternatives to dispose of the Milltown Dam?

20 THE WITNESS: No.

21 BY MR. KAPLAN:

22 Q. Did Mike Hanson ever talk to you about the
23 value of the Milltown Dam or other alternatives
24 to dispose of the Dam?

25 A. No.

1 Q. In your role as VP for accounting, did you ever
2 review any of the financials for Expanets?

3 A. No.

4 Q. In the time frame -- during 2002, what do you
5 recall being told about Expanets' performance?

6 A. There was one management meeting shortly after
7 NorthWestern bought Montana Power's assets that
8 all of the vice presidents from Montana went
9 to. There was a presentation at that
10 conference where the presidents of the various
11 divisions of the company spent ten or
12 15 minutes updating people on their progress.
13 Expanets at that point in time was confident
14 that they would meet their annual budgeted
15 target which they indicated was an aggressive
16 target.

17 Q. Was that the only thing you heard about
18 Expanets during 2002?

19 A. Other than that, on a monthly basis we would
20 see the -- on the utility financials, there
21 would be a one-line comparison of their net
22 income compared to budget for that month and
23 year-to-date.

24 Q. Why would that show on the utility financial
25 statement?

1 to clear up some things.

2

3

EXAMINATION

4

5 BY MR. KALECZYC:

6 Q. Do you remember telling Mr. Kaplan, Ernie, that
7 you were the normal contact for The Bank of New
8 York trustee with respect to QUIPS?

9 A. That's correct.

10 Q. During the period of time between the
11 acquisition of Montana Power LLC and the
12 going-flat transaction, were you ever contacted
13 by The Bank of New York and told that QUIPS
14 payments had not -- had failed to be made when
15 due?

16 A. No.

17 Q. During that same time period between the
18 acquisition and the going-flat transaction,
19 were you ever contacted by the trustee and told
20 there was an event of default?

21 A. No.

22 Q. Now, between the time that the going-flat
23 transaction was completed in November 2002 and
24 June of 2003 when you testified you left the
25 company, were you ever told by The Bank of New

1 Q. Do you remember you testified no?

2 A. That's correct.

3 Q. Why didn't you in November, approximately
4 November 2002 before the going-flat transaction
5 was completed, request a fairness opinion?

6 MR. KAPLAN: Objection, asked and
7 answered.

8 THE WITNESS: My understanding was
9 that NorthWestern owned the assets or owned
10 the LLC which owned the assets and that the
11 transaction was really just a change in the
12 form of that ownership of the assets. They
13 still were responsible for the liabilities
14 that attached to the assets. But it was
15 strictly a change in the form of ownership.

16 BY MR. KALECZYC:

17 Q. Did you have any concern in your own mind in
18 November 2002 that after the going-flat
19 transaction was completed, that NorthWestern
20 would not be able to continue to make QUIPS
21 payments?

22 A. No.

23 Q. Why not?

24 A. The balance sheet of NorthWestern was strong.
25 They were a very large company. The company

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1 had just recently issued some debt and did not
2 have a difficult time issuing that debt.

3 Q. And when you say "balance sheet," do you mean
4 the consolidated balance sheet of
5 NorthWestern Corporation?

6 A. The consolidated balance sheet.

7 MR. KALECZYC: I have no other
8 questions. I don't know if you have any,
9 Nancy.

10 MS. DELANEY: I have no questions.

11 MR. KAPLAN: I have a couple of
12 follow-up on those questions.

13
14 FURTHER EXAMINATION

15
16 BY MR. KAPLAN:

17 Q. You just testified that when NorthWestern
18 issued debt it had no difficulty issuing the
19 debt. Do you recall saying that?

20 A. Yes.

21 Q. What to you make that statement based on?

22 A. I worked on the preparation of the financials
23 that were used to support -- to get the debt.
24 And from everything that I had seen in my
25 personal involvement, there wasn't a difficulty

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